United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1011

BP/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 74-1011

UNITED STATES OF AMERICA,	:	
Plaintiff-Respondent,	:	CRIMINAL ACTION
- vs -	:	On Appeal from Judgment
ANTHONY POLITO,	:	of Conviction of the United States District
Defendant-Appellant.	:	Court for the Eastern District of New York
	:	

BRIEF ON BEHALF OF
DEFENDANT - APPELLANT

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On Brief

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STATEMENT OF THE CASE

Petitioner, Anthony Polito, was indicted on the 19th day of September 1972, by a Federal Grand Jury in the United States District Court for the Eastern District of New York, on one count of knowingly, willfully and unlawfully having possession of stolen property in violation of Title 18 U.S.C. Section 2315 and Section 2 (See appendix for copy of said indictment).

Indicted with Anthony Polito was co-defendants, Thomas Buttafuoco, Jessie Pearson and Patrick Rayll. Trial date, for the four co-defendants, was set for March 16, 1973, however the State was unable to proceed at that time and the trial was put off indefinitely. Nevertheless, the State was able to proceed and on September 24, 1973 the trial, under Honorable Orrin G. Judd, U.S.D.J. and jury, was commenced in the Untied States District Court of the Eastern District of New York. The trial lasted until October 3, 1973, when all four defendants were found guilty as charged.

Defendant, Anthony Polito, filed his appeal on December 28, 1973 and the Court ordered that it be docketed before January 27, 1974. On January 16, 1974, the defen-

dant, Anthony Polito, filed his check of $50.00 with the Court for docketing the appeal and the Court ordered that the appellant's brief and appendix be filed on or before March 5, 1974.

On December 28, 1973, Orrin G. Judd, Judge of the United States District Court for the Eastern District of New York, sentenced the defendant, Anthony Polito, to two and one-half years custodial and $2,500 fine. However, the sentence has not been imposed pending the outcome of this appeal.

QUESTIONS PRESENTED FOR REVIEW

1. DID THE ADMISSION OF A LETTER, PROMISING NO PROSECUTION, AND THE FAILURE TO PERMIT DELVING EXAMINATION, INTO THE FACTS BEHIND THE LETTER, CREATE A PREJUDICIAL ERROR?

2. HAS THE APPELLANT BEEN DENIED HIS RIGHT TO A FAIR TRIAL, WHEN THE STATE FAILED TO PRODUCE CORROBORATING TESTIMONY OF A PROSECUTING ACCOMPLICE WITNESS?

3. HAS THE COURT EXCEEDED ITS JUDICIAL GUIDELINES, WHEN IT PERMITTED A CONVERSATION WITH THE JURY SUBSEQUENT TO THE JURIES SEQUESTRATION, AS TO PERTINENT FACTS RELEVANT TO THE CASE AT HAND.

STATEMENT OF FACTS

On August 31, 1972, Mr. Ira Kirschner was arrested by the FBI, specifically Agents Sooker and Schofield, for possession of stolen property.(T 81)[1]. After the arrest of Ira Kirschner, Ira Kirschner was taken to the FBI headquarters where he was questioned as to the identity of a "Tony", and after being shown several photographs, identified one as being the defendant, Anthony Polito. (T 96). Ira Kirschner, who during the trial was the State's primary witness, stated that he knew the property, he was holding, was stolen,(T 95) and that his testimony implicated the defendant, Anthony Polito, and the three other defendants in the crime of possession of stolen property. It should be noted that waive motions were made, at the commencement of this trial, in order to pinpoint the procedures used by the investigating officers in permitting an identification, by the State's witness, of the co-defendants. The motion to have the identification

[1]Capital T indicates transcript and arabic number, subsequent to the transcript, is the page of the transcript as recorded by Michael Piccozi, Official Court Reporter.

squashed, by the Defense Counsels, was denied on the grounds that it was lacking in merit.(T 106).

During the trial Mr. Kirschner testified to the fact that he was a wholesaler and in possession of a two-hundred foot warehouse, located at 41 Kane Drive, Long Island, New York. (T 109). Ira Kirschner testified that on August 28, 1972 he received stolen property at his warehouse and on August 31, 1972 he was arrested by the FBI. However, in exchange for immunity, granted by the Prosecutor, Mr. Kirschner testified concerning facts that were relevant to the conviction of the defendant, Anthony Polito.(T 111, 113).

Ira Kirschner testified that he knew a Thomas Buttafuoco, one of the co-defendants, from prior employments and that he had discussed earning additional money through sources that Mr. Buttafuoco represented to him, and it was through these representations that Mr. Kirschner alleged he met the other co-defendant, specifically Mr. Rayll and then, subsequently, co-defendant, Anthony Polito.(T 121, 123, 128, 140). Mr. Kirschner contended that this meeting was in late July and that he specifically spoke with defendant Polito and showed the defendant throughout his warehouse and spoke to him concerning the ability he had

in disposing of certain types of merchandise, that would be sold to drug stores and discount stores.(T 143-145). Ira Kirschner also stated that it was during this conversation that he mentioned, to defendant Polito, that he did not want any type of hijacking involvement because of the violence involved. Where, according to Mr. Kirschner Anthony Polito stated that there was no problem as to any violence being involved, because all he had to do was back up a truck to pick up an order from Jones', since his company was right next to that of the Jones Trucking Company.

The next time that Ira Kirschner met Anthony Polito, according to Kirschner's testimony, was on the evening of Auagust 28, 1972, when Anthony Polito and Jessie Pearson arrived at Kirschner's warehouse with a trailor truck, loaded with Colgate-Palmolive products. Prior to this time and early in the evening there were telephone calls, according to Mr. Kirschner, both between himself and several of the defendants involved in this matter.(T 146-149). It was nine-thirty, according to Kirschner's testimony, in the evening before he encountered the defendant, Anthony Polito, although he spent the early part of the evening with the co-defendant, Pat Rayll, specifically,

at Pat Rayll's house and at the warehouse.(T 151-155). After the truck arrived, all co-defendants and Mr. Kirschner proceeded to unload the truck into Mr. Kirschner's warehouse and it wasn't until two-thirty in the morning of the following day that the unloading was completed and the parties separated.(T 164).

Ira Kirschner and two of his IMK employees and another wholesaler, Jules Ertman, of Janco Distributors in Bayshore, proceeded to rearrange the warehouse and then start moving the merchandise into the warehouse of Jules Ertman.(T 166). But prior to having all the merchandise moved out of the warehouse of Ira Kirschner, eight or ten FBI Agents, who had been surveying Ira Kirschner's warehouse, arrested Ira Kirschner, his employees and Jules Ertman and one of his employees for possession of stolen property.(T 179). Subsequent to Kirschner's arrest, he was released on bail. However, he stated that on the afternoon of his arrest, that being August 31, 1972, he told the same story to the FBI Agents that he is allegedly now telling in front of the Court.

On cross-examination Mr. Kirschner stated that it was approximately one-half hour that he spent with Anthony Polito on his first meeting with him and that he could

not recall how Mr. Polito was dressed. Nor did Mr. Kirschner know what markings were on the truck that was allegedly brought to his warehouse, with the load of stolen merchandise.(T 240).

Mr. Verdiramo, Defense Counsel for Anthony Polito, brought out that the fact that the other parties that were arrested with Ira Kirschner, specifically: Jules Ertman, David Sanbourn and Thomas Newly, were friends of Ira Kirschner and that these individuals were now not being prosecuted, through the testimony that was now being illicited from Ira Kirschner. Mr. Kirschner then stated that it wasn't until February or March, of the following year, that he gave the name of "Tony" to the investigating officers, other than his allegedly giving that name on the day that he was arrested.(T 245). Mr. Verdiramo's cross-examination further covered areas in which he attempted to show that Ira Kirschner had been previously involved in stolen property; such as, loads of candy and toilet cleaner.(T 249). In fact on December 6, 1972, the alleged friends of Ira Kirschner were brought to trial on the same charges as the co-defendants in this matter, however, their case was dismissed on the grounds that the State was not ready to proceed.(T 252, 279).

The State then proceeded to stipulate that specific telephone numbers belonged to the Defendants and State's witness; however, Mr. Polito, through his attorney Mr. Verdiramo, contended that there was no knowledge, on the part of defendant Polito, that in fact the number given, by the State, was the defendant Polito's phone number.

The State called William E. Kelly, Special Agent with the Federal Bureau of Investigation.(T 296-297). Mr. Kelly testified that he was investigating the warehouse of IMK Sales on the 30th of August 1972 and proceeded to look through a window in the warehouse of IMK Sales, where he observed boxes of Colgate-Palmolive products which he believed to be stolen. After obtaining a search warrant, he and several other agents, specifically: Marty Crow and Warren Gaynor, entered the warehouse of IMK Sales with the search warrant and arrested Ira Kirschner, Mr. Sanborn and Mr. Kuenle.(T 304). The FBI Agent also stated that through his surveillance he observed the truck owned by Janco-Distributors. Agent Kelly further testified to the fact that he was aware of the employer of Anthony Polito, who he specified as Schiabone-Fitzpatrick Company, a construction company.(T 311). Agent Kelly testified to the fact that Ira Kirschner gave a

statement, soon after his arrest, and it was written out and signed by the witness, Ira Kirschner. However, it wasn't until six months subsequent that the Prosecutor granted Ira Kirschner the immunity.(T 316). Agent Kelly testified that he did not see Mr. Polito during his surveillance and that his reliance on the statement of Mr. Kirschner was the sole basis for him to believe that the property was stolen.(T 323, 325). Agent Kelly also had several meetings with Mr. Polito and made the statement, "He was pulling my chain" and that his arrest of Anthony Polito was based on suspicion without proof.(T 330, 325). Though Agent Kelly did admit to numerous conversations with Mr. Polito, he denied having offered him a reward for him to get back some cameras or offering him a warehouse, in which to conceal stolen merchandise.(T 342). It should be noted at this time that the State only supplied one witness, that being Ira Kirschner, to connect the defendant, Anthony Polito, with this alleged crime and the witness was also an accomplice. The Court pointing out that it is not necessary to supply corroboration when the witness was an accomplice. A motion on behalf of Anthony Polito, to dismiss the complaint,

due to the government's failure to bring in any corroborating evidence was thereby denied.(T 346).

Anthony Polito, along with co-defendants, Thomas Buttafuoco and Jessie Pearson, took the stand on their own behalf. Defendant Buttafuoco stated that he did know Ira Kirschner, as Ira Kirschner had testified, prior to August 28, 1972 and this acquaintance lasted several years prior to that time. Mr. Buttafuoco contended that he was called by Ira Kirschner, the evening of August 28, 1972, for the sole purpose of assisting Mr. Kirschner in unloading a trailor truck that was located at Ira Kirschner's warehouse. He went to Ira Kirschner's warehouse, but upon observing the enormity of the job, he notified Ira Kirschner that he didn't want to get involved and then he "left" and went home.(T 349-364). Buttafuoco's own relationship with co-defendant, Anthony Polito, was the fact that, in 1972, he purchased a Volkswagon from Anthony Polito. This purchase had been arranged through co-defendant, Pat Bayl who introduced Anthony Polito to Buttafuoco.(T 365). Phone calls between Mr. Polito and Buttafuoco were in relation to a Volkswagon transmission problem.

Co-defendant, Jessie Pearson, had character witnesses testify on his own behalf, in the same manner that Mr.

Buttafuoco and Mr. Polito had their character witnesses testify. Jessie Pearson specifically stated that he was more than likely in North Carolina at the time of the alleged hijacking, due to bills of loading and other types of material which he submitted as evidence. He also stated that he did not know co-defendant, Anthony Polito, with whom he allegedly drove the truck to Ira Kirschner's warehouse.(T 105).

Anthony Polito testified on his own behalf, stating that he knew Mr. Ira Kirschner from his purchasing gifts for charity, from Ira Kirschner, around November of 1971. Mr. Polito contended that he had an appointment with Mr. Kirschner, on August 28, 1972, for the purpose of loaning him some money. However, Mr. Polito did not keep the appointment and Ira Kirschner probably called him, concerned as to why he did not keep the appointment.(T 452). Mr. Polito earns $28,000 to approximately $48,000 per year as a foreman on his job and contended that he had no knowledge of this stolen load of property, that he was charged with. Anthony Polito had occasion to visit Rayburn Trucking on several occasions. However, he was not familiar with the co-defendant, Mr. Jessie Pearson, who was a truck driver for the company, Rayburn Trucking.

(T 467, 468, 475).

Judge Orrin G. Judd's final summation eluded to the fact that charges, against parties that were arrested with Ira Kirschner, were dropped.(T 736). This dropping of charges was not testified to, in fact it was repression by the Judge.(T 268). This repression turned out to be a partial repression since it did allow the Prosecutor's letter promising that the Prosecutor would not prosecute Ira Kirschner if Ira Kirschner testified against the co-defendants of this trial.(T 114, 119). This notorious pre-trial activity, where a known criminal perpetrator is let free because he consented to testify against Anthony Polito and the three other co-defendants, taken in concert with the attempt to have Anthony Polito testify against other parties, demonstrates a lack of success towards the interest of justice.(T 701, 327).

ARGUMENT

POINT I

PERMITTING THE ADMISSION OF THE PROSECUTOR'S LETTER, WHICH STATED THAT THE PROSECUTING WITNESS WOULD NOT BE PROSECUTED, AND FAILURE TO ALSO ALLOW EXAMINATION OF THE PROSECUTING WITNESS, AS TO OTHERS ARRESTED WITH THE PROSECUTING WITNESS, CREATED A PREJUDICIAL TRIAL IMBALANCE AND DENIAL OF DUE PROCESS.

As developed in our statement of the facts, the jury in order to have found the appellant, Anthony Polito, guilty of the crime charged, must have believed the testimony of Ira Kirschner. Kirschner, an accomplice by his own admission, was the only Government witness to implicate the appellant. The fact that Kirschner may have furthered his own interests, by testifying, was a matter for the jury to consider in assessing the witness' credibility. 1 Wharton's Criminal Evidence, P. 45. Where the question of credibility was so important an issue the jury, through the testimony of the witness and the summation of the Prosecutor, was led to believe that Kirschner received no assurances that he would not be prosecuted, in return for his testimony. The decision of Brady vs. State of Maryland, 373 U.S. 83 (1963), held that the Prosecutor has a duty to disclose exculpatory or other-

wise favorable evidence to the accused. The Brady (SUPRA) case was an extension of the doctrine held in Mooney vs. Holohan. 294 US 103 (1935). that held that a prosecuting attorney was under a constitutional duty to disclose evidence which was beneficial to the defendant's case. There it was held that a conviction obtained through the use of knowingly false and perjured testimony can not be permitted to stand. Subsequent decisions reaffirm the decision that the use of perjured testimony, known to be such by the prosecuting attorney is a denial of due process. What the appellant Polito is contending, in this argument, is that the Prosecutor managed to cover up all the details that were related to the parties that were arrested with Ira Kirschner, at the time of his arrest.

The State may contend that the dismissal of these Defendants, specifically: Jules Ertman, David Matthew Sanborn and Thomas Newly, Jr., as evidenced by the record of proceedings in the criminal against the same, was enough to satisfy the requirement that the Prosecutor show any favorable evidence that he may have concerning the appellant.(T 245-252).

The State may further contend that a later decision in United States vs. Keogh, 391 F.2d 138 (2nd Cir., 1968)

Judge Friendly noted that although the issue of a Prosecutor's good faith in bringing forward favorable evidence to an accused's behalf, there was also a requirement of materiality. This readily brings forward the question of, to what degree of materiality need a defendant show in a given situation. In Keogh, (SUPRA), the Court recognized that the degree of materiality must be directly related to the severity of the breach of some duty which is required by the Prosecutor. Also note United States vs. Consolidated Laundries Corp., 291 F.2d 563 (2nd Cir., 1961), which indicated that a motion for a new trial may properly be granted where the Government has negligently suppressed material evidence.

Although, as stated above, Brady erased the requirement that the suppression must be either deliberate or negligent. These delineations still bear heavily on a question of materiality. Since the credibility, of Ira Kirschner's testimony, can only be tested through the circumstances that led up to his coming forward and testifying at the trial; therefore at best the instance case is one where the Prosecutor has failed to come completely clean. The breach of that duty, it is respectively submitted, requires that a new trial be ordered.

POINT II

THE COURT ERRED WHEN IT PERMITTED THE GOVERNMENT TO PROCEED WITHOUT PROVIDING CORROBORATION OF THE PROSECUTING WITNESS.

The testimony of a self confessed active accomplice to a crime, must be scrutinized for credibility. In addition to scrutinizing the circumstances under which his testimony was purchased; as pointed out under Point I of the argument, corroboration of this testimony is needed to sustain the verdict. At the case at hand, Judge Orrin Judd blatantly ruled that corroboration was not nedded in this case. (T 346). The law on corroboration of accomplices is not a blatant rule, it is rather a flexible rule that applies in the circumstances and facts of each particular case. Valdez vs. U.S., 244 U.S. 432, 37 S Ct. 733, 61 L Ed. 1244. The State may contend that the Court's obligation is to instruct the jury to the fact that the evidence, given by the accomplice, should be received with great caution and to this end the Court did instruct the jury accordingly. However, the appellant contends that this is insufficient, in the present case, since the accomplice is of the character which requires corroboration. See Cash vs. Culver, 3L Ed. 557, 358 US 633

and Caminetti vs. United States, 242 US 470, 37 S Ct. 192, 61L Ed. 442.

Obviously the State is going to point out that these cases have held that corroboration of an accomplice is not essential. To this the appellant consents. However, the appellant contends that the question, whether or not corroboration is necessary, is one that must be decided in each and every individual case and the facts of that specific case. In this case as pointed out in Argument I the appellant was not permitted to delve into the circumstances under which the accomplice, Ira Kirschner, testified. Because of this, the petitioner was not allowed to show facts that would demonstrate a need for corroboration of the testimony given by the accomplice. Due to this failure of the Court, the defendant-appellant has been denied his right to a fair trial because he would have been given the right to have the accomplice's testimony corroborated. Wherefore, the appellant contends that he has been denied his due process and the said trial should be reversed.

POINT III

JUDGE ORRIN JUDD EXCEEDED HIS JUDICIAL BOUNDS AND PREJUDICED THE APPELLANT WHEN HE MAINTAINED A COLLOQUY WITH THE JURY.

After the jury was sequestered, to deliberate as to their verdict, they notified the Court that they had questions as to testimony. The jurors were brought forward and the testimony, that they requested, was read to them. This was all well and good; however the Court, on its own, maintained a running conversation with the jury. (T 785). Nevertheless, there is no other time in the trial that is more critical to the defendant. For it is at this time that the jury is deliberating upon the facts that were represented to them and specifically as to the credibility of the witnesses. For now the fate of the defendants lies in the hands of the jurormen, not in the hands of the Court. Appellant is specifically referring to Transcript page 781 through 789, where the jurors appear to be wanting clarification as to specific telephone calls. The Judge, rather than going to the the transcript, referred to his notes as to what telephone was used to call what telephone and who owned or in who's name these telephones were listed.

The law is that a charge to the jury, in a criminal case, should not be misleading. It should be given with candor and with proper regard in deference to opinions of each other, without emphasis on certain areas or judicial notes as to specific fact. Rollenbach vs. United States, 326 US 607, 66 S Ct. 402, 90 L Ed. 350, and Allen vs. United States, 164 US 492, 17 S Ct. 154, 41 L Ed. 529. What the appellant is arguing on this Point III, is not that these instructions would be erroneous if given during the general summation and backed up with instructions as to other judicial notes as to testimony that was given. What the appellant is contending is that these special instructions have biased the jury. This bias, that was instilled in the jurors' minds subsequent to the jurors hearing the final summation and being sequestered to deliberate, prevented the appellant from receiving a fair trial by a jury of his own peers because the jurormen became biased, through the Judge's subsequent remarks.

CONCLUSION

For the reasons herein stated, it is respectfully submitted that the judgement of the Court Below be reversed. That the Court order the conviction of the petitioner, Anthony Polito, be vacated and that the indictment against him be dismissed.

Respectfully submitted,

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